

1903023 (Migration) [2022] AATA 459 (9 February 2022)

- 1.
- 2.

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1903023

MEMBER: Moira Brophy

DATE: 9 February 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the first named applicant, the second named applicant and the third named applicant meet the following criteria for Subclass 117 (Orphan Relative) visas:

- Public interest criterion 4020 for the purposes of cl 117.223 of Schedule 2 to the Regulations.

Statement made on 09 February 2022 at 4:24pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – bogus documents provided with visa application – national identity documents – verification checks – documents obtained through agent – not necessary that applicant was aware that documents were bogus – country information – prevalence of document fraud – compassionate or compelling circumstances to waive requirement – visa applicants’ limited capacity to verify documents – elapse of time since visa application made – review applicant’s health – conditions in visa applicants’ home country – identity – consistency of other documents and information – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 117.223, Schedule 4, criterion 4020(1), (2A), (4)

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 January 2019 to refuse to grant the applicants Child (Migrant) (Class AH) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 11 December 2012. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 117.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found that the applicant had provided bogus documents in support of the application and did not meet public interest criterion (PIC) 4020.
5. The Tribunal exercised its discretion to hold the hearing by video. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by video, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by video. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. [The review applicant] appeared before the Tribunal on 18 November 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the partner of the review [applicant]. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
7. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

Background

9. The review applicant was born in Afghanistan and is currently [Age] years old. He first entered Australia [in] April 2010 as an unlawful maritime arrival. He was granted a protection visa on 6 April 2011. He was granted a resident return visa on 27 September 2016. He applied for Australian citizenship but his application has not yet been determined.
10. The applicants state on their applications they are orphans and are the biological brothers of the review applicant. Their mother died after the birth of the youngest applicant and their father died from an illness some years later. The applicants lived with the review applicant and his wife in Afghanistan and the family moved to Quetta in 2009. After the review applicant came to Australia the applicants continued to live with the wife of the review applicant who cared for them.
11. The applicants applied for the visas on 11 December 2012. In support of the application the applicants submitted their Afghani National Identity Documents (known as a taskira).
 - For [the first named applicant] (DOB [Date]), they provided a taskira (serial number [Number]). A later taskira obtained on 15 October 2018 (serial number [Number]) was subsequently provided.

- For [the second named applicant] (DOB [Date]) a taskira (serial number [Number]) was provided. A later taskira obtained on 15 October 2018 (serial number [Number]) was subsequently provided.
 - For [the third named applicant] (DOB [Date]) they provided a taskira (serial number [Number]). A later taskira obtained on 15 October 2018 (serial number [Number]) was subsequently provided.
12. The Department referred the original provided taskiras for independent verification checks with the issuing Afghani Government authorities on 11 September 2018. On 28 September 2018 the Afghanistan Civil Central Registration Authority (ACCRA) advised that the taskira serial numbers did not correspond with ACCRA records and based on that advice the Department determined the taskiras were fraudulent.
 13. On 19 November 2018 the Department wrote to the applicant's agent with this information and invited them to comment on the adverse findings as to the bogus documents.
 14. In a submission dated 17 December 2018 it was submitted the provided documents had been obtained through an agent and the applicant had no way of knowing they were fraudulent documents. The documents issued had not been obtained because of any false or misleading statement and the applicant submitted he was entitled to rely on them. Those documents had been used to obtain passports and no issue as to their authenticity was raised during that process.
 15. An interview was conducted with the review applicant on 11 September 2018.
 16. There were three delegate decisions to refuse to grant the visas on the basis that in each instance the applicants did not satisfy the requirements of cl 117.223 of Schedule 2 to the Regulations because the delegate found that the applicants had provided bogus documents (taskiras) in support of the applications and did not meet PIC 4020. Each decision was made by the same delegate. In the three decisions the delegate made no findings as to identity and considered waiver under PIC 4020(4) but the circumstances relied on, being the financial support provided by the review applicant, the death of the parents of the applicants and the general circumstances of the applicants and their uncertain futures were found to be not sufficiently compelling to waive.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in this review is whether the applicant meets PIC 4020 as required by cl 117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

18. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

19. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of 'bogus document' to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
20. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
21. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
22. The documents identified by the Department as being bogus were the taskiras of the applicant and of the second named applicant.
23. The Tribunal has had regard to country information on document fraud in relation to Afghan identity documents, as advised in the DFAT Country Information Report, Afghanistan dated 27 June 2019. The taskira certificate is the most common form of identification in Afghanistan. In May 2018, President Ghani announced the official launch of the electronic taskira (the e-taskira), becoming the first person to be issued with one. The new e-taskira cards contain a watermark security feature and microchip and comply with international standards for electronic identity documents. The Tribunal accepts that at the time these taskiras were purported to have been issued, the taskiras were printed on plain paper and include the bearer's name, father's name, grandfather's name, place and date of birth, place of residency, type of occupation and military service status. Information included on askira certificates is sometimes incomplete. Other than standard seals, taskiras do not include any security features. Generally, the required supporting information for the issuance of a taskira will be a copy of the father's taskira. Record-keeping is not centralised or computerised.
24. The Tribunal accepts there are widespread concerns regarding the availability of fraudulent identity documentation in Afghanistan. Because the process for obtaining some documents, including taskiras, is largely decentralised to the provincial level, and because the

documentation itself does not contain robust security features, the system is vulnerable to fraud.

25. The Tribunal accepts the evidence of the review applicant that the original taskiras were obtained through an agent in Quetta as his wife, being a Hazara woman was refused entry to the Consulate. She was offered assistance by an agent and given the practical, on ground reality that Hazara Afghans in Pakistan were frequently discriminated against she used an agent to assist her. It was not uncommon that agents would take advantage in such instances.
26. The Tribunal relies on the evidence obtained by the Department from the Afghan authorities that the original taskiras provided by the applicants were bogus documents in that they were not registered by ACCRA. The taskiras issued had non valid serial numbers. The Tribunal relies on this evidence to find the taskiras are bogus documents because they were purported to have been, but were not, issued by the relevant Afghan authorities in respect of the applicant.
27. The integrity of Australia's immigration system is based on the authorities being able to rely upon documents provided by applicants in support of any application. The fact that an applicant may lack any formal education or that reliance on official documents is not used in their home countries does not absolve an applicant from meeting the requirement that they do not provide bogus documents in support of an application.
28. As the Tribunal has found that the applicant provided a bogus document in relation to their application for the orphan relative visa, the applicant does not meet PIC 4020(1).
29. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

30. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
31. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
32. For the following reasons, the Tribunal **is** satisfied that the requirements should be waived.
33. There is no information before the Tribunal that there are any compelling circumstances that affect the interests of Australia which would justify the granting of the visa.
34. The only family members of the applicant who are Australian citizens or permanent residents of Australia are the review applicant, his wife and three children.
35. When considering the waiver of PIC 4020 and whether there are compassionate and compelling circumstances affecting an Australian permanent resident, the Tribunal considers it relevant and appropriate to consider the evidence as to the circumstances in which the

bogus documents were provided. While the applicants provided these taskiras the Tribunal accepts they were obtained from a person in Quetta with apparent authority. The wife of the review applicant was alone in Quetta with a number of children in her care. Her husband was already in Australia. The applicants were young and dependent on their carer. They were not in a position to know the documents were bogus and they had limited capacity to verify the documents. The documents were not provided as a result of a fraudulent intent or misrepresentation. It was only after the review applicant tried to obtain a taskira after he had arrived in Australia that he realised the documents issued in Quetta were not genuine. It was then he determined to apply again for the taskiras that were needed to make an application for his family to join him in Australia.

36. The review applicant is currently living in Victoria with his wife and three children. He was separated from his wife and two older children for seven years. Since his wife came to Australia, they have had a third child. The review applicant had bought a home and is self-employed as [an Occupation]. The three applicants are not employed. They are reliant on the review applicant for monetary support. That has been especially difficult the last two years as his income has been adversely impacted by the COVID-19 pandemic. Prior to his wife coming to Australia his brothers lived with her and his two older children.
37. Significantly, the relevant visa application relating to this review was lodged nearly 10 years ago, on 11 December 2012, and the uncertainty of waiting to be reunited with his orphaned brothers has taken a heavy toll on the health of the review applicant, both physically and emotionally. There is no third-party country where the applicants could live together, given that they all have fled from Afghanistan and it remains a dangerous country, particularly in the present climate. The review applicant can visit the applicants in Quetta, but he has no right to live or work there.
38. The Tribunal also had regard to the previous Department's policy (PAM3) which sets out that if the applicant's country of residence is a war zone or the sponsor has been found to be a person to whom Australia owes protection, this would be a factor for considering a waiver of any or all of PIC 4020(1) and (2). This factor is directly applicable to the review applicant.
39. The Tribunal is persuaded that the review applicant's mental and emotional health have been affected by his inability to be with his siblings he feels responsible for. His wife spoke of him having high levels of stress and the impact that had on him and their family. He was constantly anxious as to the safety of his brothers. The Tribunal considers the factors in this case, including the review applicant's long-term separation from his brothers, and the precarious position they were in Pakistan, since leaving Afghanistan are sufficient to amount to compassionate and compelling circumstances.
40. Therefore, the requirements of PIC 4020(1) are to be waived.

Has the applicant satisfied the identity requirements?

41. Public interest criterion 4020(2A) requires an applicant satisfy the Tribunal as to their identity. The Tribunal is not in a position to say that all submitted documents are genuine. These are matters that the Department can more carefully scrutinise, although the Tribunal has no evidence before it to indicate that the documentation apart from the first issued taskiras are not genuine.
42. The Tribunal has carefully considered the documents provided apart from the taskiras and has considered other factors including the consistency of information given by the applicants and review applicant as to their life story. The Tribunal has also considered that this application was made in 2012, the health checks and biometrics have been provided, the

issue of identity not being satisfied, and the consequences of an adverse finding on identity have not been raised.

43. On the basis of the information submitted to the Tribunal, and the consistency of their life story, the Tribunal is satisfied as to the applicants' identity. Therefore, the applicants meet PIC 4020(2A).

44. Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

45. Public interest criterion 4020(2B) requires that neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA). The Tribunal does not have any evidence that this requirement is not met.
46. Therefore PIC 4020(2B) is met.

47. Conclusion

48. On the basis of the above, the three applicants satisfy PIC 4020 for the purposes of cl 117.223. Accordingly, the application of the applicants should be remitted to the Department for consideration of the other criteria.

DECISION

49. The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the first named applicant, the second named applicant and the third named applicant meet the following criteria for Subclass 117 (Orphan Relative) visas:
- Public interest criterion 4020 for the purposes of cl 117.223 of Schedule 2 to the Regulations.

Moirá Brophy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...